INDEX.

CITATIONS.

CASES:

STATUTES:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 411

JAMES A. DAGGS, *Petitioner*

v.

GROVER C. KLEIN, Rear Admiral, United States Navy, Commandant, Mare Island Navy Yard; and JAMES V. FORRESTAL, Secretary of the Navy.

No. 412

JOHN BRAITO, *Petitioner*

v.

GROVER C. KLEIN, Rear Admiral, United States Navy, Commandant, Mare Island Navy Yard; and JAMES V. FORRESTAL, Secretary of the Navy.

On Petition For Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the Northern District of

California in No. 411 (No. 411, R. 13-18) and the order of the District Court of the United States for the Northern District of California in No. 412 (No. 412, R. 27-28) have not been reported. The opinion of the United States Court of Appeals for the Ninth Circuit (No. 411, R. 26-29) is reported at 169 F. 2d 174.

JURISDICTION

The judgments of the United States Court of Appeals for the Ninth Circuit were entered on August 9, 1948 (No. 411, R. 25, 30). On November 9, 1948, Mr. Justice Douglas extended petitioners' time to file a petition for writs of certiorari to and including November 15, 1948, "providing the statutory time has not already expired" (No. 411, R. 31). The petition for writs of certiorari was filed on November 12, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the suits included in the petition for a writ of certiorari have abated.

2. Whether the Secretary of the Navy is an indispensable party to an action for reinstatement and back-pay by a civil-service Navy Department employee dismissed from the Mare Island Navy Yard under the Act of June 28, 1940, 54 Stat. 679, 50 U. S. C. App. 1156, which authorized summary discharge of an employee "whose immediate re-

moval is, in the opinion of the Secretary [of the Navy] warranted by the demands of national security."

STATUTE INVOLVED

Pertinent portions of the Act of June 28, 1940, Public Law No. 671, 54 Stat. 676, 50 U. S. C. App. 1156, are set forth in the Appendix, *infra*, p. 15.

STATEMENT

These substantially identical actions, each dismissed on the complaint, present claims for reinstatement and back-pay by two Navy Department employees dismissed for reasons of national security under the Act of June 28, 1940.

1. On May 6, 1946, petitioner Daggs filed his complaint in the District Court for the Northern District of California, Southern Division, against Admiral Klein, then Commandant of the Mare Island Navy Yard and James V. Forrestal, then Secretary of the Navy (No. 411, R. 2-11). The jurisdictional allegation was that the matter in controversy exceeded $3,000 and arose under the Constitution and laws of the United States (No. 411, R. 2). Daggs alleged that from November 1926 until June 1941 he was a civil-service machinist at the Mare Island Navy Yard (No. 411, R. 3), and that on or about June 30, 1941 he was discharged from this employment (No. 411, R. 5). On July 24, 1941, he was informed by Rear Admiral Friedell, Commandant of the Navy Yard at that time, that his discharge "was warranted by

the demands of national security and was made from this Navy Yard because a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States" (No. 411, R. 5-6). He was told that within thirty days he had the privilege of submitting a written statement or affidavit (No. 411, R. 6); and shortly thereafter he informed Admiral Friedell in writing that he had had no time, for four years past, to associate with any members of organizations which would or would not advocate the overthrow of our constitutional form of government; that he belonged only to a Masonic Lodge and the United Federal Workers of America (C.I.O.); that he had not attended meetings of any kind, even of these organizations; and that he would like to meet his accuser face to face (No. 411, R. 6-7). The complaint goes on to allege that petitioner made repeated demands upon Admiral Friedell and upon the defendants (Admiral Klein and Secretary Forrestal) for a full statement of the reasons for his removal, for reinstatement, and for back pay; that these demands were not granted, and the only reasons for his discharge given to petitioner were those contained in the statement made by Admiral Friedell on July 24, 1941; and that this statement was too vague

and indefinite to permit petitioner to submit the statement or affidavits referred to in the Act of June 28, 1940 (Public Law No. 671) (No. 411, R. 7-8). Daggs further alleged that "during all times herein mentioned his entire course of conduct prior to his dismissal was and now is for the attainment of wholly lawful objectives" (No. 411, R. 8-9), and that he should have been informed of the name or identity of the organization mentioned in Admiral Friedell's statement (No. 411, R. 9). Failure to accord him proper notice and hearing was alleged to be a violation of the Act of June 28, 1940, and of the Fifth Amendment (No. 411, R. 8).

The complaint concluded with an allegation that the plaintiff was without other remedy and, if not granted relief, would suffer irreparable injury, and prayed for an order (i) directing his reinstatement, (ii) requiring the defendants to compensate him for the period of removal at his former rate of pay, and (iii) requiring the defendants to reinstate his right to accrued leave with pay (No. 411, R. 9-10).

The respondents moved to dismiss the complaint on several grounds, including lack of jurisdiction over Secretary Forrestal and inability to maintain the suit in his absence since he was an indispensable party (No. 411, R. 11-12). The district court (Judge St. Sure) dismissed the action for lack of jurisdiction, on the ground that the complaint showed on its face that the action did not arise

under the Constitution or any law of the United States (No. 411, R. 13-18).

2. Petitioner Braito filed a similar complaint, on May 6, 1946, also in the Northern District of California, Southern Division (No. 412, R. 2-13). The jurisdictional allegation was the same (No. 412, R. 2). Braito alleged that he was a shipfitter at the Mare Island Navy Yard from 1919 to 1922, and a civil-service shipfitter's helper, shipfitter, and flange turner at the Yard from 1925 to July 1941 (No. 412, R. 3). On or about July 24, 1941, he was discharged from the Navy Yard, and on July 26, 1941, he was informed by Admiral Friedell of the reasons for his discharge in terms substantially identical with those given to Daggs, and also advised of his privilege to submit written statements or affidavits (No. 412, R. 5-6). On August 4, 1941, he informed Admiral Friedell, in writing, that he strongly denied all accusations of disloyalty to the United States; that he had never met any person or organization with the object of overthrowing our constitutional form of government; that he was a member of two bona fide and long established fraternal organizations, and of a labor organization (United Federal Workers of America) which he considered to be unquestionable; and that in view of his long employment he considered this statement sufficient but would supply further statements or affidavits, or appear personally, if requested (No. 412, R. 6-9).

Braito's complaint also contained allegations, virtually the same as those of Daggs', concerning his demands for and failure to receive adequate notice of the reasons for his discharge and a hearing; and concerning the lawfulness of his course of conduct, and his lack of remedy (No. 412, R. 9-11). The prayer for relief was likewise the same (No. 412, R. 12).[1]

As in Daggs' case, respondent moved to dismiss the suit on various grounds, including lack of jurisdiction over Secretary Forrestal and inability to proceed in his absence (No. 412, R. 25-26). The district court (Judge Goodman) dismissed the action for "lack of jurisdiction over the defendant, James V. Forrestal, Secretary of the Navy, an indispensable party to the action" (No. 412, R. 27-28).

3. Both plaintiffs appealed (No. 411, R. 18; No. 412, R. 28). The cases were consolidated for argument and presentation on appeal, and the court of appeals rendered one opinion affirming each dismissal on the ground that Secretary Forrestal was an indispensable party, under the rule of *Williams* v. *Fanning*, 332 U. S. 490 (No. 411, R. 26-29). The petition for writs of certiorari presents only that question (Pet. 5-6, 57, 58, 59-64).

[1] On January 31, 1947, Braito filed an amended complaint, adding an allegation that the defendants' action in removing him from employment without fuller disclosure abridged his freedom of speech, and of the press, his right peaceably to assemble, and deprived him of property without due process of law (No. 412, R. 22-23).

ARGUMENT

1. It is doubtful whether the petition for a writ of certiorari was timely filed in this Court. The final judgments of the court of appeals were entered on August 9, 1948 (No. 411, R. 25, 30). On November 9, 1948, Mr. Justice Douglas extended petitioners' time to file a petition for writs of certiorari to and including November 15, 1948, "providing the statutory time has not already expired." The petition was filed on November 12, 1948. If the former three-month time limit of Section 8(a) of the Act of February 13, 1925, 43 Stat. 936, governs, the petition is not out of time. If, however, the controlling time is the ninety-day limit of Section 2101 of Title 28 of the United States Code (as enacted by the Act of June 25, 1948, Public Law No. 773, 80th Cong., 2d sess.), the petition was filed too late, since the ninety-day period expired on November 7, 1948. We suggest that the governing requirement is that prescribed by the recent statute, which became effective on September 1, 1948 and repealed section 8(a) of the 1925 Act. Section 39 of the Act of June 25, 1948 provides that "any rights or liabilities now existing under" the repealed legislation "shall not be affected by this repeal," but we do not believe that this saving clause was designed to allow parties in petitioners' position to avail themselves of the former time limits for appeal or certiorari. Cf. Rules 73(a) and 86(b) of the Federal Rules of Civil Procedure, as

amended, 329 U. S. 866-7, 875; *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, 314.

2. We have been informed by the Navy Department that respondent Rear Admiral Grover C. Klein, now assigned to the Navy Department in Washington, D. C., ceased to perform his functions and duties as Commander, Mare Island Naval Shipyard on April 2, 1947, and that he was succeeded in that office on the same day by Captain Wallace R. Dowd. Furthermore, respondent James V. Forrestal, who was appointed Secretary of Defense on July 27, 1947, pursuant to the Act of July 26, 1947, 61 Stat. 499, 500; 5 U. S. C., Supp. I, 171a, no longer holds the office of Secretary of the Navy, his successor, John L. Sullivan, having been appointed to that office on September 18, 1947. Thus, on August 9, 1948, when the judgments were entered by the court below, more than six months had elapsed since respondents had ceased to hold their respective offices as alleged in the complaints and more than six months had likewise elapsed since those offices had been filled by their successors.[2] At no time has any attempt been made to

[2] Sec. 11 of the Act of February 13, 1925, 43 Stat. 936, 941; 28 U. S. C. (1946 ed.) 780, which authorized the successors of federal and state officers who had ceased to hold their offices to be substituted in their stead within six months after their death or separation from office, was repealed, effective as of September 1, 1948, by Sec. 39 of the Act of June 25, 1948, Pub. Law 773, 80th Cong., 2d sess. But see Rules 25(d) and 81(a) of the Federal Rules of Civil Procedure which authorize substitution within six months after the successor takes office in situations where those Rules apply.

substitute their successors in their stead. Consequently, both of the suits have abated. *LeCrone* v. *McAdoo,* 253 U. S. 217; cf. *Benzian* v. *Saul Godwin,* No. 317, this Term, certiorari denied December 6, 1948. See also Rule 19(4) of the Rules of this Court.

3. The court of appeals properly applied the rule as to the indispensability of superior officers set forth in *Williams* v. *Fanning,* 332 U. S. 490, and there is no need for review of that issue, which is the only one petitioners raise. In the *Williams* case, the superior was declared an indispensable party "if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." 332 U. S. at 493. Under that principle, the Secretary of the Navy must be joined as a party defendant in the present actions. For petitioners are suing for reinstatement and back-pay "as provided for in Public Law No. 671" (the Act of June 28, 1940, *infra,* p. 17) (No. 411, R. 9; No. 412, R. 23), and that statute vests only the Secretary with authority to reinstate employees summarily removed for national security reasons, and conditions the allowance of compensation for the period of removal on such reinstatement. If petitioners are to secure the relief they pray, the Secretary must order their reinstatement, either directly or through some sub-

ordinate. The present commandant of the Mare Island Navy Yard—the subordinate official before the district court—has no power, under the statute, to reinstate petitioners, even if (as they claim) they were not given the full information of the reasons for their removal which the Act requires. Once the Secretary has summarily removed an employee, the commandant would not be authorized to reinstate him, without the Secretary's approval or concurrence. Cf. *Gnerich* v. *Rutter,* 265 U. S. 388.

The Secretary's indispensability is made plain by the nature of the case petitioners make. They expressly base their entire claim on the Act of June 28, 1940, properly construed (No. 411, R. 7-9; No. 412, R. 20-23; Pet. 5, 60-5). The complaints do not ask the court wholly to disregard that Act as invalid on its face, and to apply only the other statutes and regulations applicable to naval civil-service employees. Nor do petitioners attack their original summary removal by the Secretary as improper or invalid, and it is plain that under the statute the Secretary could act as he did, without prior hearing or disclosure of information. The gravamen of the claim is that petitioners did not, within thirty days of their removal, receive sufficiently full information to enable them to submit answering affidavits or statements as the statute allows (No. 411, R. 7-9; No. 412, R. 20-23). The conclusion is then drawn that, because of this alleged administrative failure to

comply with the statute's terms, petitioners are entitled by the Act to automatic reinstatement, with compensation for the period of removal. But assuming that to be true, the only official who could lawfully order their reinstatement would be the Secretary of the Navy who initially removed them and who alone has statutory authority to reinstate or retain them. A decree directing the relief desired by petitioners would, therefore, not expend itself on the Navy Yard commandant who is before the court, but would require action by the Secretary who is not, and cannot be made, a party. Cf. 332 U. S. at 494.[3]

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[3] Petitioners' brief places exclusive stress on the former commandant's alleged refusal to supply more complete information as to the reasons for the removal, and asserts that the complaint is directed against this subordinate's action (Pet. 60-1, 62-3, 64). But the prayers for relief request reinstatement and award of back-pay, and do not even mention the matter of a fuller statement of the reasons for the dismissals (No. 411, R. 10; No. 412, R. 23-4). Reinstatement—the relief requested—is clearly the Secretary's province, even if the subordinate had authority of his own to make a fuller disclosure. In any case, as the court below pointed out (No. 411, R. 28-9), there is no reason to believe that the scope or type of the information to be furnished is within the commandant's own authority. The statute merely declares that the removed employee "shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal * * *"; since the Secretary is the removing power, the reasons for removal are his and he has control over the amount and type of the information to be furnished to the dismissed employees. The commandant was simply an "official designated by the Secretary"—for the convenience of both petitioners

4. Moreover, petitioners' actions appear to be barred by laches. They were dismissed from employment in June or July 1941 (No. 411, R. 5; No. 412, R. 16), and suits were not filed until May 1946 (No. 411, R. 11; No. 412, R. 13). In cases of removed federal employees seeking judicial redress, the timely bringing of suit has been repeatedly stressed. *United States ex rel. Arant* v. *Lane,* 249 U. S. 367; *Nicholas* v. *United States,* 257 U. S. 71, affirming 55 C. Cls. 188; *Norris* v. *United States,* 257 U. S. 77; *Richardson* v. *United States,* 64 C. Cls. 233; *Arant* v. *United States,* 55 C. Cls. 327; *O'Neil* v. *United States,* 56 C. Cls. 89; *Morse* v. *United States,* 59 C. Cls. 139, appeal dismissed, 270 U. S. 151; *Goodwin* v. *United States,* 76 C. Cls. 218, certiorari denied, 289 U. S. 753; *Hart* v. *United States,* 91 C. Cls. 308. Delays of eleven months (*Norris* v. *United States, supra*), thirteen months (*Morse* v. *United States, supra*), and twenty months (*United States ex rel. Arant* v. *Lane, supra*) have been held sufficient to sustain the defense of laches. In the instant cases, almost five years elapsed between petitioners' discharges and the commencement of their actions.

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and the Secretary—to inform petitioners of the Secretary's reasons. For the subordinate to supply other or more extensive information would require the Secretary's concurrence or authorization.

CONCLUSION

The decision below is correct, and the sole issue presented here is governed by a recent decision of this Court. We respectfully submit that the petition for writs of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PAUL A. SWEENEY,
OSCAR H. DAVIS,
JOHN R. BENNEY,
Attorneys.

DECEMBER 1948.

APPENDIX

The Act of June 28, 1940, ch. 440, 54 Stat. 676, 679, Sec. 6, 50 U. S. C., App. 1156, provides in pertinent part:

> * * * That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; U. S. C., title 5, sec. 652), shall not apply to any civil-service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal: *And provided further,* That within thirty days after such removal any such person shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he may desire to show why he should be retained and not removed.

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